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Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1352

IN THE

UNITED STATES SUPREME COURT

October Term 1985

FLORIDA FRUIT AND VEGETABLE ASSOCIATION, UNITED STATES SUGAR CORPORATION, and SOUTH BAY GROWERS, INC.

Petitioners

v.

WILLIAM E. BROCK, UNITED STATES DEPARTMENT OF LABOR, JOSE J. RAMIREZ, FRANCISCO RUIZ, and ANICETO CARRIZALES

Respondents

MOTION OF RESPONDENTS RAMIREZ, RUIZ, and CARRIZALEZ TO PROCEED IN FORMA PAUPERIS

Now come Respondents Jose J. Ramirez, Francisco Ruiz, and Aniceto Carrizales, and ask leave to file the attached typewritten "Brief In Opposition To Certiorari" and to proceed in forma pauperis pursuant to Rule 53.

The Petitioners' affidavit in support of this motion is attached.

Respectfully submitted,

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1app

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Attorneys for Respondents
Carrizales, Ruiz, and Ramirez

CERTIFICATE OF SERVICE

I, Edward J. Tuddenham, hereby certify that on this 7 day of December, 1986, I mailed, postage pre-paid, 3 copies of the foregoing Motion Of Respondents Ramirez, Ruiz, and Carrizalez To Proceed In Forma Pauperis on each of the following at the address shown.

Jonathan Young
Michael Kimmel
Department of Justice
Civil Division, Rm 3720
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Ann Margaret Pointer
Charles Kelso
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Edward J. Tuddenham

No. 85-1352

IN THE SUPREME COURT OF THE UNITED STATES

October Term - 1985

FLORIDA FRUIT & VEGETABLE ASSOCIATION, INC., et. al.,
Petitioners

v.

WILLIAM E. BROCK, et. al.,
Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, **Francisco Ruiz**, being first duly sworn, depose and say that I am a Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said

proceeding or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

To Oppose The Petition For A Writ of Certiorari

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed?

a. No.

b. I last had employment in November, 1985. This employment was seasonal. I worked for about six (6) weeks as a lettuce cutter. The place of employment was in Marana, Arizona. I worked as part of a crew and the crew was paid approximately $.62 per box of lettuce.

c. In the six (6) weeks I worked in Marana, Arizona in 1985, I earned approximately $1,000.00.

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends,

or other sources?

a. No to all of the above.

(3) Do you own any cash or checking or savings account?

a. No to all of the above.

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. I own a 1970 mobile home located at 2305 Cross, Laredo, Webb County, Texas.

b. I am purchasing the lot at 2305 Cross, Laredo, Webb County, Texas.

c. I own a 1974 Chevrolet suburban.

(5) List the persons who are dependent upon you for support and state your relationship to those persons.

a. Olga Ruiz - spouse

b. Sonia Ruiz - daughter (minor)

c. Laura Ruiz - daughter (minor)

d. Francisco Ruiz, Jr. - son (minor)

e. Eduardo Ruiz - son (minor)

f. Gerardo Ruiz - son (minor)

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Francisco Ruiz

Francisco Ruiz

SUBSCRIBED AND SWORN TO before me this 28th day of February, 1986.

ARACELI PRADO
Notary Public In and For
The State of Texas

My Commission Expires: 9/5/89

CERTIFICATE OF TRANSLATION

I hereby certify that I am proficient in the spanish language and I translated the above affidavit from the english language to the spanish language to the affiant prior to his signing thereof.

GRACIELA MELVE
Translator

NO. 1352

IN THE

UNITED STATES SUPREME COURT

October Term 1985

FLORIDA FRUIT AND VEGETABLE ASSOCIATION, UNITED STATES SUGAR CORPORATION, and SOUTH BAY GROWERS, INC.

Petitioners

v.

WILLIAM E. BROCK, UNITED STATES DEPARTMENT OF LABOR, JOSE J. RAMIREZ, FRANCISCO RUIZ, and ANICETO CARRIZALES

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI OF RESPONDENTS RAMIREZ, RUIZ and CARRIZALES

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IN THE
UNITED STATES SUPREME COURT

FLORIDA FRUIT and VEGETABLE ASSOCIATION, et at.	*	
Petitioners,	*	No. 1352
v.	*	
WILLIAM E. BROCK, et al.	*	
Respondents.	*	

RESPONDENTS' OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents Ramirez, Ruiz and Carrizalez, three United States farm workers, respectfully request this Court to deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 771 F.2d 1455 (11th Cir. 1985) rehearing and reh. en banc denied November 1, 1985.

STATEMENT OF CASE

Petitioners, several Florida agricultural producers and a producer association, filed this action to challenge the validity of the methodology adopted by the Department of Labor (DOL) for calculating annual increases in the Adverse Effect Rate (AER). The AER is a special minimum wage rate which employers of foreign agricultural workers are required to pay in order to assure that the importation of foreign workers does not aversely affect the wages of similarly employed U.S. workers. 20 CFR § 655.200(b). Since 1968 DOL has calculated annual adjustments in the AER based on the percentage change in farm wages in each state during the previous

year. Petitioners do not question the requirement of an AER, or the necessity for annual adjustments in that wage. Petitioners' sole challenge is to the new data base chosen by DOL to calculate annual adjustments in the AER since 1983. That data base, which is derived from the Bureau of Labor Statistic's (BLS) ES-202 program, was adopted by DOL after notice and comment rulemaking, 48 Fed.Reg. 33,684 (July 22, 1983) (proposed) 48 Fed.Reg. 40,168, 40,175 (Sept. 2, 1983) (adopted), and is codified at 20 CFR § 655.207(b)(1). Both the District Court and the Court of Appeals upheld the validity of the ES-202 data base, finding its use was neither arbitrary, capricious nor an abuse of discretion. 5 U.S.C. § 706(2)(A).

Respondents Jose J. Ramirez, Francisco Ruiz, and Aniceto Carrizales are three United States farm workers who intervened as defendants-appellees in this action, to support the ES-202 methodology and assure that farm worker interests in the prompt payment of the AER were protected.

Respondents will not repeat the complete statement of the case, although they do note several errors in the Petitioners' statement of the case. First, Petitioners imply that the adoption of the ES-202 methodology represented a change in policy from past practice such as occurred in Motor Vehicle Manufacturers Assn. v. State Farm Mut. Auto., 463 U.S. 29 (1983). See Petition at pp. 6-7, 8-9. In fact, the data base which DOL traditionally relied upon to adjust AERs, the U.S.D.A. Quarterly Farm Survey, was discontinued in 1981. Thus when DOL adopted the ES-202 data in 1983, it did not 'revoke' a prior regulation or 'change' settled agency practice, it merely chose a new data base to replace one that no longer existed. See

48 Fed.Reg. 232 (Jan. 4, 1983); Id. 33,384 (July 22, 1983); Id. at 40,168, 40,172 (Sept. 2, 1983); Shoreham Co-op. Apple Producers v. Donovan, 764 F.2d 135, 141 (2nd Cir. 1985).

Second, Petitioners state that no experts at DOL examined the ES-202 methodology or consulted with BLS. Petition at 7, 10, 13. There is no support in the record for these assertions. DOL has been setting adverse effect wage rates for years. See Florida Sugar Cane League v. Usery, 531 F.2d 299, 303-304 (5th Cir. 1976); Dona Ana County Farm & Livestock Bureau v. Goldberg, 200 F.Supp. 210 (D.D.C. 1961); 41 Fed.Reg. 25,018 (June 22, 1976); 42 Fed.Reg. 40,192-3 (Aug. 9, 1977); 43 Fed.Reg. 10,310 (March 10, 1978). It must be presumed that DOL drew on this expertise in adopting the ES-202 methodology and drafting the explanation for it in the Federal Register.

Finally, Petitioners assert that in adopting the ES-202 methodology DOL did not respond to the criticism of Petitioners' expert, Dr. James Holt. In fact, the statement in the Federal Register accompanying the final rule did address those points, as the Second Circuit noted in Shoreham, 764 F.2d at 141-142; 48 Fed.Reg. 40,170-40,172 (Sept. 2, 1983).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. REVIEW SHOULD BE DENIED GIVEN THE UNANIMITY OF THE CIRCUITS AND THE IRREPARABLE INJURY FURTHER REVIEW WOULD CAUSE U.S. FARMWORKERS.

Three different circuit courts of appeal have reviewed the ES-202 methodology and all three have unanimously concluded that the

methodology is valid. In addition to the Eleventh Circuit's opinion at issue in this case, the Second and Fourth Circuits have also upheld the validity of the ES-202 methodology. Shoreham Co-op. Growers Assn. v. Donovan, 764 F.2d 135 (2nd Cir. 1985); Virginia Agricultural Growers Assn. v. Donovan, 774 F.2d 89 (4th Cir. 1985) reh. and reh. en banc denied Jan. 29, 1986. See also Production Farm Management v. Brock, 767 F.2d 1368 (9th Cir. 1985) (upholding AER for Arizona).

In the face of such thorough consideration and unanimity among the circuits, it would serve no useful purpose for this Court to expend its limited resources reviewing the ES-202 methodology. This is particularly true in light of the urgent need to have the validity of the methodology settled as quickly as possible.

The AER is designed to prevent the importation of large numbers of foreign workers from depressing the wages of U.S. workers. However, since this litigation began, employers of foreign workers have refused to pay the required annual increases in the AER. They have, instead, been allowed to continue to offer the 1982 AER pending the outcome of this suit--a wage offer well below the minimum defined by the current AER. Farm workers' interests in receiving the AER wage increases for 1983, 1984, and 1985 have been protected in part by the establishment of escrow accounts or letters of credit to cover the difference between the wages paid and the wages mandated by the ES-202 increases. However, these escrow accounts cannot fully protect U.S. workers from the irreparable injury caused by Plaintiffs' refusal to offer the current AER.

U.S. farm workers are among the poorest workers in the nation. See Sosnick, Hired Hands: Seasonal Farm Workers in the United States, 22-23 (1978); S. Report No. 93-1295, 93rd Cong., 2nd Sess. 1-2, reprinted in 1974 U.S. Code Cong. & Ad. News 6441-6442; H.R. No. 97-885, 97th Cong., 2nd Sess. reprinted in 1982 U.S. Code Cong. & Ad. News 4548-4549. For the most part they live from pay check to pay check. Such workers must choose jobs on the basis of the wages actually offered, not on the basis of wages which might be paid out of an escrow account at some date in the future. Because this litigation allows Petitioners to offer wages depressed below the current AER, it has the effect of discouraging U.S. workers from seeking employment with H-2 employers. Each year the litigation continues the more depressed the wage offer becomes (relative to the wage required by the AER) and the more U.S. workers are discouraged from seeking employment with H-2 growers. This is precisely the adverse effect the AER was designed to prevent.

This irreparable injury to U.S. workers may have been unavoidable while the case was pending in the district court and during Petitioners' appeal as of right to the Eleventh Circuit. But there is no reason for allowing this irreparable injury to continue by granting Petitioners a discretionary appeal of their challenge to the ES-202 methodology. Three circuit courts gave plenary consideration to Petitioners' arguments, far more consideration than most issues get. Whatever value there might be in further review is far out weighed by the irreparable injury which the delay inherent in such review would cause U.S. farm workers.

II. REVIEW SHOULD BE DENIED BECAUSE PETITIONERS SEEK REVIEW OF FACTUAL DETERMINATIONS OF NO PRECEDENTIAL VALUE

The Petition for Certiorari does not challenge the legal standards for review of agency action.[1/] Rather than a legal attack, Petitioners simply ask this Court to apply well settled legal standards to determine as a factual matter whether DOL's choice of the ES-202 data base was arbitrary and capricious in the face of the criticisms raised by the Petitioners' paid expert. Such review can have no precedential value or meaning beyond the narrow facts of this case.

This Court could easily fill its docket each year reviewing the rationality of hundreds of administrative decisions such as the choice of the ES-202 methodology. It would serve no useful purpose for this Court to review the record in this case to determine the rationality of this agency decision, particularly in light of the thorough and unanimous review it has received from the Eleventh, Fourth, and Second Circuits.

III. THERE IS NO MERIT IN PETITIONERS' CHALLENGE TO THE ES-202 METHODOLOGY

Finally, the decisions of the Eleventh, Fourth and Second Circuits are obviously correct on the merits, so that there is no point in further review by this Court.

The basic flaw in Petitioners' challenge is that they have misunderstood the function of agency rule making. Petitioners attack the ES-202 methodology because, in the eyes of Dr. Holt, it contains

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[1/] Petitioners' claim that the Court of Appeals misapplied Motor Veh. Manf. Assn. v. State Farm Mutual, 463 U.S. 29 (1983), is inapposite because that case involved a change in agency policy. Here, there has been no change in policy.

flaws which might make it less than a perfect scientific measurement of annual increases hourly farm wages. The short answer to this is that DOL is not engaged in the business of academic research. Because of the need to regulate and the constraints of limited time and resources, regulatory agencies cannot afford the luxury of scientific perfection. They must make reasoned choices from what is available.

In this case, DOL is under a statutory and regulatory mandate to offset the adverse effects of the importation of foreign workers and it must do this every year. 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c); 8 C.F.R. § 214.2(h)(3)(i). See NAACP, Jefferson Co. Branch v. Donovan, 566 F.Supp. 1202 (D.D.C. 1983). When the traditional data for measuring changes in hourly rates was no longer available, DOL had to replace it with something. The ES-202 data was available and DOL concluded that the percentage change in annual earnings measured by the ES-202 data provided a reasonable estimate of the percentage change in hourly wages. DOL concluded that the theoretical problems cited by Petitioners would not render the estimates produced by the data unreasonable in practice. Application of the ES-202 methodology bears out DOL's conclusion that it is a reasonable measure of changes in wages. Indeed, the increases produced by the ES-202 methodology are substantially the same as those produced by the U.S.D.A. data favored by Petitioners. See Shoreham, 764 F.2d at 142 n. 20.

While Petitioners now extol the virtue of the U.S.D.A. farm labor data, (Pet. at 9, 19), that data also only estimates changes in wages and has potential for error. It too was challenged as arbitrary, capricious and an abuse of discretion by H-2 growers.

Rowland v. Marshall, 650 F.2d 28 (4th Cir. 1981). That challenge, like the challenge to the ES-202 data, was rejected. The point is that no matter what data base is selected, some growers, somewhere will object to its imperfections. If such challenges were sustained government would come to a halt. The fact is that DOL's choice of the ES-202 methodology was a reasonable one; nothing more is required. Cf. Building and Construction Trades Department AFL-CIO v. Donovan, 712 F.2d 611, 618-619 (D.C.Cir. 1983). The Second, Fourth, and Eleventh Circuits correctly rejected Petitioners' challenge and there is no need for further review.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward J. Tuddenham, hereby certify that on this 7 day of March, 1986, I mailed, postage pre-paid, 3 copies of the foregoing Opposition to the Petition for Writ of Certiorari on each of the following at the address shown.

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